78-1473

Supreme Court, U. S.
FILED
MAR 24 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

State of California Court of Appeal
Case No. 1/Civil 45445

JAMES B. PACKARD, *Petitioner*

VS.

CITY OF VALLEJO, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of California

JAMES B. PACKARD
715 Tennessee Street
Vallejo, California 94590
Telephone: (707) 644-8221
Petitioner In Propria Persona

Dated: February 28, 1979

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OCTOBER TERM, 1978

State of California Court of Appeal
Case No. 1/Civil 45445

JAMES B. PACKARD, *Petitioner*

vs.

CITY OF VALLEJO, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of California

Petitioner, IN PROPRIA PERSONA and Defendant-Appellant in the lower court, prays that a Writ of Certiorari issue to the Supreme Court of the State of California after decree IN BANK dated February 14, 1979.

JURISDICTION ALLEGATION

The jurisdiction of the United States Supreme Court for this case is established by USCA TITLE 28, § 1257 (3)—immunity claim under provision of United States Constitution; TITLE 28, § 2106—power to reverse and remand, and TITLE 28, § 2101 (c)—certiorari applied for within 90 days after decree; and expressed eloquently from the comments of Justice Harlan in *Gibbons v. State of Mississippi,* 162

U.S. 565 at 586, 16 S.Ct. 904 at 908, 40 L.Ed. 1075, cited in the case *Hetherington v. Griffin T.V. Inc.*, 430 F.Supp. 493, 500 (1977) quoting as follows:

> "As the judges of the state courts take an oath to support the Constitution of the United States as well as the laws enacted in pursuance thereof, and as that Constitution and those laws are of supreme authority, anything in the Constitution or laws of any state to the contrary notwithstanding, upon the state courts equally with the courts of the Union rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them, and if they fail therein, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the state in which the question could be decided to this Court for final conclusive determination." *Robb v. Connolly*, 111 U.S. 624, 637, 4 S.Ct. 544, 28 L.Ed. 542.

QUESTIONS PRESENTED

1. What is the obligation of the contract?

2. Is the contract clause of the United States Constitution, Art. I (10) (1), interpreted the same as the contract clause of the California State Constitution, which proscribes the enactment of any law impairing the obligation of contracts, Old Art. I (16) now Art. I (9) (1974)?

3. Do the doctrines of Collateral Estoppel or Res Judicata prevent defendant from using the defense of the contract clause of the United States Constitution, Art. I (10) (1)?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution Article I(10)(i):

> "No State shall pass any law impairing the obligation of contracts."

Constitution of the State of California:

Article I(16) [repealed November 1974]:

> "No law impairing the obligation of contracts shall ever be passed."

Article I(9):

> "A law impairing the obligation of contracts may not be passed."

City of Vallejo, California Ordinance No. 909 N.C.

(See Appendix A)

City of Vallejo, California Ordinance No. 234 N.C. 2d

(See Appendix B)

STATEMENT OF CASE

This case is an action based on a Complaint for the collection of 166.70 dollars unpaid utility users taxes plus 41.68 dollars as penalty for the period of June 1, 1974 to January 31, 1977, pursuant to Vallejo City Ordinance 909 N.C. enacted August 4, 1969 (App. A), and 234 N.C. 2d enacted July 29, 1974 (App. B). Complaint was originally filed in the Vallejo Municipal Court on May 2, 1977, CT 2. Demurrer to the Complaint was overruled and case ordered transferred to the Superior Court on May 25, 1977, CT 34 (App. C). An appeal to the Appellate Department of the Superior Court from the Order of Transfer was dismissed November 15, 1977, CT 47 (App. D). Judgment by Default was entered January 31, 1978, CT 55, and set aside by

Order February 8, 1978, CT 58. Order Amended March 2, 1978, CT 60. Demurrer to the Complaint overruled March 24, 1978, 15 days to answer, CT 69 (App. H). Answer to Complaint and Declaration of defendant notarized March 6, 1978 (App. I) filed March 31, 1978, CT 70. Plaintiff's Motion for Summary Judgment filed April 7, 1978, CT 81. Objection to Motion for Summary Judgment filed April 17, 1978, CT 96. Court's Order after hearing granting Motion for Summary Judgment filed June 15, 1978, CT 122 (App. J). Supplemental Declaration by Michael B. Lynch, City Tax Assessor, for additional amount of unpaid utility users tax through May 31, 1978 filed July 13, 1978, CT 134. Summary Judgment granted for 296.58 dollars plus 59.40 dollars costs filed July 13, 1978, CT 131 (App. K). Notice of Entry of Judgment by Clerk on July 13, 1978, CT 130. A supplemental opinion relative to Order granting Summary Judgment was rendered August 10, 1978, CT 140 (App. M). Judgment for total amount of 333.15 dollars paid by defendant August 15, 1978, CT 142. Notice of Appeal to the State Court of Appeal filed August 16, 1978, CT 143. Motion for Summary Reversal by Appellant Denied December 19, 1978. (App. N) Appeal Dismissed, Filed February 6, 1979. (App. O) Appellant's Motion to Transfer case to California Supreme Court Denied IN BANK February 14, 1978. (App. P)

Federal Question

Petitioner first raised the federal constitutional question in his demurrer to the Complaint in Municipal Court, CT 26, line 16, claiming "utility users tax is applied to defendant's contracts in violation of the United States Constitution" citing *Murray v. Charleston,* 24 L.Ed. 760, and *M. & E. R.R. v. Yard,* 24 L.Ed. 354. Municipal Court Overruled Demurrer, and granted plaintiff's Motion to Transfer case to Superior Court pursuant to CCP 396, CT 34. (App. C)

On appeal to the Appellate Department of the Superior Court petitioner again raised the federal constitutional question; appellate court's interpretation of defendant's defense was that defendant was claiming the ordinances were unconstitutionally enacted, CT 47, line 22, and defendant was "relitigating issues previously settled by final judgment", CT 48, line 21. (App. D)

Petitioner again raised federal constitutional question in his Demurrer to the Complaint in Superior Court, CT 61, citing *Unemp. etc. Comm. v. St. Francis Homes etc. Assn.,* 58 C.A.2d 271 (1943) at page 280, Para. 12, "The legality of a tax is involved when the taxpayer contends that the tax is illegally assessed or levied against him." Also, again citing *Murray v. Charleston, supra* plus *Coolidge v. Long,* 75 L.Ed. 562 and *Georgia R.R. v. Redwine,* 96 L.Ed. 338, CT 62. The Demurrer was Overruled, no written opinion, CT 69. (App. H)

Federal constitutional question again raised in defendant's Answer to Complaint, CT 73, lines 13-18, quoting:

> "In contrast (to California Constitution contract clause) the United States Constitution contract clause prohibits the allowance of any law within any state of the United States impairing the obligation of contracts. This clause prohibits this Superior Court from allowing Ordinance 909 N.C. and 234 N.C. 2d to impair the obligation of this defendant's contracts for utility services."

In Defendant's Declaration, CT 74, (App. I) the obligation of the contract that defendant has with the utilities is actually expressed for each service. At CT 77, line 4, quoting:

> "The obligation of the contract is the *Total charge for service* shall only equal the rate times the amount of utilities used (for gas and electricity) and the rate times one month (for telephone)."

The utility users tax is not included in the obligation of the contract this petitioner has with the utilities. Defendant has refused to pay the tax because payment of the tax would impair the obligation of the contracts, CT 76, line 31, in violation of the United States Constitution, Art. I (10) (1) to wit: "No State shall pass any law impairing the obligation of contracts", which prohibits the enforcement, operation and execution of any law impairing the obligation of contracts, CT 76, lines 22-25.

Federal constitutional question again raised at Hearing on Motion for Summary Judgment at RT 11, quoting:

> The Court: So you're willing to concede that the Ordinance is valid, but that it's being unconstitutionally enforced because you're billed under its terms.
>
> Mr. Packard: Right. And then that impairs the obligation of the contract. Do you know what the obligation of the contract is?
>
> The Court: I have some understanding of that, yes. RT 12.

The Motion for Summary Judgment was granted on the basis of having considered the arguments of counsel both for and against the granting of the motion and all things having been done and considered. CT 122. (App. J)

Federal constitutional question again raised in Motion for Summary Reversal in State Appellate Court. Appellant requested that the Summary Judgment be reversed and remanded, citing the case of *United States Trust Co. v. The State of New Jersey*, 431 U.S. 1, 52 L.Ed.2d 92 (1977) for a determination that the utility users tax has the effect of impairing a contractual obligation, because of this court's interpretation of the contract clause at L.Ed.2d 109 (11) quoting "that it literally proscribes any impairment." Appellant's motion was denied with no reasons stated. Appellant's Motion for Transfer to the California Supreme Court on basis Court of Appeal was disregarding appellant's cited authority was denied by the Supreme Court IN BANK, no reasons stated. (App. P)

ARGUMENT

Petitioner believes the writ of certiorari should be allowed because all the court decisions this petitioner has received in this case are not in accord with applicable decisions of this Supreme Court.

Murray v. Charleston, 24 L.Ed. 761. This court would not allow the taxing ordinance to be enforced on Murray's contract in existence prior to the enactment of the ordinance, because of impairment prohibited by the contract clause of the United States Constitution.

Coolidge v. Long, 75 L.Ed. 562. This court would not allow the Massachusetts inheritance tax to be enforced on Coolidge's trust deeds in existence prior to the enactment of the state inheritance statute, because of impairment prohibited by the contract clause of the United States Constitution, Art. I (10) (1).

Geo. R.R. & Bkg. v. Redwing, 96 L.Ed. 338. This court would not allow the state school tax to be enforced on the Geo. R.R. & Bkg. property which was tax exempt by a contract in existence prior to the enactment of the school tax, because of impairment prohibited by the contract clause of the United States Constitution, Art. I (10) (1).

United States Trust Co. v. The State of New Jersey, 431 U.S. 1, 52 L.Ed.2d 92 (1977). This court would not allow the New Jersey repealing statute to be enforced on the covenant, because of impairment prohibited by the contract clause of the United States Constitution. In this case this Supreme Court approved the procedure of the Superior Court making a determination that the repeal has the effect of impairing a contractual obligation, 52 L.Ed.2d 106 ([4(a)]).

Similarly this petitioner believes this court should issue the writ prayed for in this case, because petitioner had all his utility contracts in existence prior to the enactment of the utility users taxing ordinances, (see Declaration, App. I), and the imposition of the utility users tax as part of petitioner's contracts causes impairment of the obligation of the contract prohibited by the contract clause of the United States Constitution, Art. I (10) (1).

WHEREFORE PETITIONER PRAYS that this Supreme Court issue the writ of certiorari, and take the necessary steps to reverse the decision of the California Supreme Court, the decisions of the Court of Appeal and the Judgment of the Superior Court; and remand this case to Superior Court for determination of this petitioner's contention that the utility users tax has the effect of impairing contractual obligations. If petitioner's contention is correct, the utility users tax cannot be enforced on petitioner's contracts, and petitioner is entitled to damages from respondent for receiving benefits from impairment of the obligation of the contract prohibited by the contract clause of the United States Constitution, Art. I (10) (1).

Dated: February 21, 1979.

JAMES B. PACKARD
Petitioner In Propria Persona

(Appendices Follow)

Appendices

Appendix A

[9] ORDINANCE NO. 909 N. C.

AN ORDINANCE OF THE CITY OF VALLEJO ESTABLISHING A UTILITY USERS TAX AND PROVIDING FOR THE COLLECTION THEREOF, PENALTY FOR DELINQUENCY, REMEDIES, AND ENFORCEMENT.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF VALLEJO, AS FOLLOWS:

TITLE. This Ordinance shall be known as the Utility Users Tax Ordinance of the City of Vallejo.

DEFINITIONS. Except where the context otherwise requires, the definitions given in this Paragraph govern the construction of this Ordinance:

(a) *Person.* "Person" shall mean any domestic or foreign corporation, firm, association, syndicate, joint-stock company, partnership of any kind, joint venture, club, Massachusetts Trust, business trust, or common-law trust, society, or individual.

(b) *City.* "City" shall mean the City of Vallejo.

(c) *Telephone Corporation, Electrical Corporation, Gas Corporation.* "Telephone Corporation, Electrical Corporation, Gas Corporation" shall have the same meanings as defined in Sections 234, 218, and 222, respectively, of the Public Utilities Code of the State of California, as said sections existed on July 1, 1969.

(d) *Tax Administrator.* "Tax Administrator" shall mean the Treasurer of the City of Vallejo.

(e) *Service Supplier.* "Service Supplier" shall mean a person required to collect and remit a tax imposed by this Ordinance.

(f) *Service User.* "Service User" shall mean a person required to pay a tax imposed by this Ordinance.

(g) *Month.* "Month" shall mean a calendar month.

TELEPHONE USERS TAX IMPOSED.

(a) There is hereby imposed a tax upon every person in the City, other than a telephone corporation, using intrastate telephone communication services in the City. The tax imposed by this Paragraph shall be at the rate of five (5) percent of all charges made for such services and shall be paid by the person paying for such services.

(b) As used in this Paragraph, the term "charges" shall not include charges for services paid for by inserting coins in coin-operated telephones except that where such coin-operated telephone service is furnished for a guaranteed amount, the amounts paid under such guarantee plus any fixed monthly or other periodic charge shall be included in the base for computing the amount of tax due; nor shall the term "telephone communication services" include land mobile services [10] or maritime mobile services as defined in Section 2.1 of Title 47 of the Code of Federal Regulations, as such section existed on July 1, 1969.

(c) Notwithstanding the provisions of Subsection (a), the tax imposed under this paragraph shall not be imposed upon any person for using intrastate telephone communication services to the extent that the amounts paid for such services are exempt from or not subject to the tax imposed by Section 4251 of Title 26 of the United States Code, as such section existed on July 1, 1969, without regard to Subsection (b) thereof.

ELECTRICITY USERS TAX IMPOSED. There is hereby imposed a tax upon every person, other than an electrical corporation or a gas corporation, who receives electrical energy within the limits of the City from an electrical corporation. The tax imposed by this paragraph shall be at the rate of five (5) percent of all charges made for such energy, including minimum charges for service, and shall be paid by the person paying for such energy.

GAS USERS TAX IMPOSED.

(a) There is hereby imposed a tax upon every person, other then a gas corporation or an electrical corporation, who receives gas within the limits of the City which is delivered through mains or pipes by a gas corporation. The tax imposed by this paragraph shall be at the rate of five (5) percent of all charges made for such gas, including minimum charges for service, and shall be paid by the person paying for such gas.

(b) Charges made for gas to be used in the generation of electrical energy by an electrical corporation shall be excluded from the charges on which the tax imposed by this paragraph is computed.

COLLECTION OF TAX.

(a) Every person receiving payment of charges from a service user shall collect the amount of tax imposed by this ordinance from the service user.

(b) The tax shall be collected insofar as practicable at the same time as and along with the collection of charges made in accordance with the regular billing practice of the service supplier. Except in those cases where a service user pays the full amount of said charges but does not pay any portion of a tax imposed

by this ordinance, or where a service user has notified a service supplier that he is refusing to pay a tax imposed by this ordinance which said service supplier is required to collect, if the amount paid by a service user is less than the full amount of the charge and tax which has accrued for the billing period, a proportionate share of both the charge and the tax shall be deemed to have been paid.

(c) The duty to collect tax from a service user shall commence with the beginning of the first regular billing period [11] applicable to that person which starts on or after the operative date of this ordinance. When a person receives more than one billing, one or more being for different periods than another, the duty to collect shall arise separately for each billing period.

REPORTING AND REMITTING. Each service supplier shall, on or before the last day of each month, make a return to the Tax Administrator, on forms approved by him, stating the amount of taxes collected by the service supplier during the preceding month. At the time the return is filed, the full amount of the tax collected shall be remitted to the Tax Administrator. The Tax Administrator may require further information in the return. Returns and remittances are due immediately upon cessation of business for any reason.

FAILURE TO PAY TAX—ADMINISTRATIVE REMEDY. Whenever the Tax Administrator determines that a service user has deliberately withheld the amount of the tax owed by him from the amounts remitted to a service supplier, or that a service user has failed to pay the amount of the tax for a period of four or more billing periods, or whenever the Tax Administrator deems it in the best interest of the City, he may relieve the service supplier of

the obligation to collect taxes due under this ordinance from certain named service users for specified billing periods. The Tax Administrator shall notify the service user that he has assumed responsibility to collect the taxes due for the stated periods and demand payment of such taxes. The notice shall be served on the service user by handing it to him personally or by deposit of the notice in the United States mail, postage prepaid thereon, addressed to the service user at the address to which billing was made by the service supplier; or, should the service user have changed his address, to his last known address. If a service user fails to remit the tax to the Tax Administrator within fifteen (15) days from the date of the service of the notice upon him, which shall be the date of mailing if service is not accomplished in person, a penalty of twenty-five (25) percent of the amount of the tax set forth in the notice shall be imposed, but not less than $5.00. The penalty shall become part of the tax herein required to be paid.

ACTION: TO COLLECT. Any tax required to be paid by a service user under the provisions of this ordinance shall be deemed a debt owed by the service user to the City. Any such tax collected from a service user which has not been remitted to the Tax Administrator shall be deemed a debt owed to the City by the person required to collect and remit. Any person owing money to the City under the provisions of this ordinance shall be liable to an action brought in the name of the City for the recovery of such amount.

ADMINISTRATIVE AGREEMENTS. The Tax Administrator may make administrative agreements to vary

the strict requirements of this ordinance solely for the purpose of providing that collection of any tax imposed herein may be made in conformance with the billing [12] procedures of a particular service supplier so long as the overall result of said agreements results in collection of the tax in conformance with the general purpose and scope of this ordinance. A copy of each such agreement shall be on file and available for public examination in the Tax Administrator's office.

RULES AND REGULATIONS. The Tax Administrator shall have power to adopt rules and regulations not inconsistent with the provisions of this ordinance for the purpose of carrying out and enforcing the payment, collection and remittance of the tax herein imposed; and a copy of such rules and regulations shall be on file and available for public examination in the Tax Administrator's office. Failure or refusal to comply with any rules and regulations promulgated under this paragraph shall be deemed a violation of this ordinance.

SEVERABILITY. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this ordinance or any part thereof is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this ordinance or any part thereof. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases be declared unconstitutional.

EXEMPTIONS. The following entities, viz; United States Government, State of California, County of Solano, City of Vallejo, Vallejo Unified School District, Vallejo Sanitation and Flood Control District and Greater Vallejo Recreation District are and each of them is specifically exempted from the provisions of this ordinance, and nothing in this ordinance shall be construed as imposing a tax upon any of said entities. Nothing in this ordinance shall be construed as imposing a tax upon any person if imposition of such tax upon that person would be in violation of the Constitution of the United States or the Constitution of the State of California.

EFFECTIVE DATE. This ordinance shall take effect and be in full force and effect from and after 1 October 1969 and the taxes imposed by this ordinance shall become operative as of October 1, 1969.

[13] *ADOPTED AS ABOVE,* at a regular meeting of the City Council of the City of Vallejo, held on the 4th day of August, 1969, by the following vote:

AYES: Councilmen Cunningham, Curtola, Dittman, Dubnoff, Levezzo, Martinez and Roche.

NOES: None.

ABSENT: None.

Attest: Helen G. Seeber
City Clerk

Approved: August 7, 1969

Florence E. Douglas
Mayor

Disapproved:

Appendix B

[17] ORDINANCE NO. 234 N. C. (2d)

AN ORDINANCE OF THE CITY OF VALLEJO AMENDING ORDINANCE NO. 909 N. C., IMPOSING THE UTILITY USERS' TAX, AND CHAPTER 3.12 OF THE VALLEJO MUNICIPAL CODE BY AMENDING SECTIONS 3.12.030(A), 3.12.040, AND 3.12.050, AND DECLARING THE ORDINANCE AN URGENCY MEASURE TO BE EFFECTIVE ON AUGUST 1, 1974 AND TO BE OPERATIVE ON AUGUST 1, 1974.

THE COUNCIL OF THE CITY OF VALLEJO DOES ORDAIN AS FOLLOWS:

SECTION 1. Sections 3.12.030, 3.12.040 and 3.12.050 of the Vallejo Municipal Code as set forth in corresponding parts of Ordinance No. 909 N.C., entitled "The Utility Users' Tax Ordinance of the City of Vallejo" are hereby amended as follows:

Section 3.12.030. TELEPHONE USERS' TAX IMPOSED—RATE—EXEMPTIONS.

A. There is hereby imposed a tax upon every person in the city, other than a telephone corporation, using intra-state telephone communication services in the City. The tax imposed by this section shall be at the rate of seven and one-half percent of all charges made for such services and shall be paid by the person paying for such services.

B. (Unchanged)

C. (Unchanged)

Section 3.12.040. ELECTRICITY USERS' TAX IMPOSED—RATE.

There is hereby imposed a tax upon every person, other than an electrical corporation or a gas corporation, who receives electrical energy within the limits of the City from an electrical corporation. The tax imposed by this section shall be at the rate of seven and one-half percent of all charges made for such energy, including minimum charges for service, and shall be paid by the person paying for such energy.

Section 3.12.050. GAS USERS' TAX IMPOSED—RATE—EXCLUSIONS.

[18] A. There is hereby imposed a tax upon every person other than a gas corporation or an electrical corporation, who receives gas within the limits of the City which is delivered through mains or pipes by a gas corporation. The tax imposed by this section shall be at the rate of seven and one-half percent of all charges made for such gas, including minimum charges for service, and shall be paid by the person paying for such gas.

B. Charges made for gas to be used in the generation of electrical energy by an electrical corporation shall be excluded from the charges on which the tax imposed by this section is computed.

SECTION 2. EFFECTIVE DATE

This ordinance shall take effect and be in full force and effect on and after August 1, 1974, and the taxes imposed by this ordinance shall become operative as of August 1, 1974.

SECTION 3. URGENCY MEASURE

This ordinance is hereby declared by the City Council to be necessary as an emergency measure for the immediate preservation of the public peace, health and safety and the reason for its urgency is that the well being of the citizens of the City of Vallejo is directly related to the revenue measure required to finance the City of Vallejo operating budget for the 1974-75 fiscal year and in order to provide the revenue to fully fund said budget it is necessary that the City receive the utility users' tax at the increased rate commencing October, 1974, which because of billing cycles and collection procedures requires imposition of said tax at the increased rate as of August 1, 1974, and for this reason is hereby declared an urgency measure and shall take effect on August 1, 1974.

[19] PASSED AND ADOPTED as above, at the regular meeting of the City Council of the City of Vallejo held on the 29th day of July, 1974, by the following vote:

AYES: Councilmen Asera, Bertuzzi, Cunningham, Douglas, Dubnoff and Sibley.

NOES: None.

ABSENT: Councilman Curtola, excused.

Florence E. Douglas,
Mayor

Attest: Helen G. Seeber,
City Clerk

Appendix C

[34] JOHN M. POWERS
City Attorney, City of Vallejo
City Hall
Vallejo, California 94590
(707) 553-4245

William R. Galstan
Deputy City Attorney
Attorney for Plaintiff

Municipal Court of California, County of Solano
Vallejo-Benicia Judicial District

No. 29401—66975

City of Vallejo,
Plaintiff

vs.

James B. Packard,
Defendant.

[Filed May 31, 1977, Solano County Superior Court]

[Filed May 25, Vallejo Municipal Court]

ORDER TRANSFERRING CASE TO SUPERIOR COURT

The demurrer of the defendant and the motion to transfer case to Superior Court (Code of Civil Procedure § 396) by plaintiff having come before me regularly this day, WILLIAM R. GALSTAN, Deputy City Attorney appearing for plaintiff and JAMES B. PACKARD, in pro per,

also appearing, and upon having read the points and authorities in this matter and having heard argument thereon, and good cause appearing therefore:

IT IS HEREBY ORDERED that the demurrer of the defendant is overruled and the motion of plaintiff to transfer this matter to the Superior Court is granted. This case is therefore [35] transferred to the Superior Court in and for the County of Solano in accordance with the provisions of § 396 of the Code of Civil Procedure.

Dated: May 25, 1977.

R. J. Swan
Judge of the Municipal Court

Appendix D

[47] In the Appellate Department of the Superior Court
County of Solano, State of California

No. 67645

City of Vallejo,
a Municipal Corporation,
Plaintiff and Respondent,
v.
James B. Packard,
Defendant and Appellant.

[Filed November 15, 1977]

OPINION

Plaintiff city has adopted ordinances imposing taxes on telephone, cable television, electricity and gas users in the city (with exemptions not pertinent here). The tax imposed is a percentage of the value of the service rendered the user.

Defendant refused to pay the tax imposed by the ordinances, claiming them to be unconstitutional. The city thereupon filed suit in the Municipal Court to collect them.

Defendant demurred on the ground the Municipal Court was without jurisdiction. The city, also on the ground the Municipal Court was without jurisdiction, moved to transfer the case to the Superior Court. Defendant only prayed his demurrer be sustained.

While it seems clear the Municipal Court is without jurisdiction, C. C. P. § 86(1), and that court properly transferred the case to the proper court pursuant to C. C. P. § 396, we do not reach that issue because the order transferring the [48] case is not an appealable order.

Appealable orders of the Municipal Court are enumerated in C. C. P. § 904.2 and the order appealed from is not one of them. The right to appeal being wholly statutory, and this appeal not being allowed by statute, we can only dismiss the appeal without reaching any question of the propriety of the order of transfer or the merits of the case. *Milliken v. Gray,* 276 C.A. 2d, 595.

Respondent has asked we impose costs for a frivolous appeal, calling our attention to numerous prior, and unsuccessful, attempts to litigate the same issue appellant raises in the instant case.

In determining this issue courts have considered: 1. lack of merit in the appeal; 2. whether taken for delay only; 3. part of a continuing course of frivolous appeals or relitigation of the same issue; 4. is the purpose of the appeal to burden or badger the opposing party†; and 5. appellant's experience and legal ability or lack thereof. See *6 Witkin Cal. Proc.,* pp. 4432, 3.

While we are willing to grant appellant's sincerity, it clearly appears the appeal is without merit, and relitigates issues previously settled by final judgment. However the dismissal of the appeal leaves the issue pending on proper transfer in the Superior Court. In this posture of the case we deem it inadvisable to impose costs for taking a frivolous appeal.

[49] The appeal is dismissed. The request for cost for a frivolous appeal is denied without prejudice.

Dated: November 15, 1977

Norman A. Gregg
Presiding Judge*

Robert J. Cooney
Judge*

Richard E. Arnason
Judge*

*Judges assigned by Chairperson of the Judicial Council.

Appendix E

[55] John M. Powers
City Attorney, City of Vallejo
City Hall
Vallejo, California 94590
(707) 553-4245

Michael H. Roush
Deputy City Attorney
Attorney for Plaintiff

In the Superior Court of the State of California
In and for the County of Solano

No. 67645

City of Vallejo,
Plaintiff,
vs.
James B. Packard,
Defendant.

[Filed January 31, 1978]

JUDGMENT BY DEFAULT BY CLERK

The Defendant James B. Packard having been regularly served and processed, and having failed to answer the plaintiff's complaint filed herein, and the default of the said defendant James B. Packard having been duly entered upon application of said plaintiff to the clerk,

IT IS ADJUDGED that plaintiff do have and recover from defendant James B. Packard the sum of $207.38 principle, $10.44 interest to the date hereof, and $52.60 costs; together with interest on said judgment as provided by law.

[56] Judgment entered January 31, 1978.

(SEAL) NEIL CRAWFORD
Clerk of the Superior Court

By:
Deputy Clerk

Appendix F

[58] In the Superior Court of the State of California
In and for the County of Solano

No. 67645

City of Vallejo,
Plaintiff,

vs.

James B. Packard,
Defendant.

[Filed February 8, 1978]

ORDER SETTING ASIDE DEFAULT AND DEFAULT JUDGMENT BY CLERK

The court having been informed that a default was entered against the defendant erroneously and should be set aside

Now, Therefore, It Is Hereby Ordered As Follows:

1. The default and default judgment entered by the Clerk are hereby set aside and vacated; AND

2. The defendant shall have thirty (30) days from date to answer to the complaint.

Dated This 8th day of February, 1978.

Raymond J. Sherwin
Presiding Judge

Appendix G

[60] In the Superior Court of the State of California
In and for the County of Solano
Department No. Two

No. 67645

City of Vallejo,
Plaintiff,
vs.
James B. Packard,
Defendant.

[Filed March 2, 1978]

ORDER AMENDING ORDER

Good Cause Appearing Therefor

It Is Hereby Ordered that the previous order of this Court dated February 8, 1978, as to paragraph 2 thereof, is hereby amended to read as follows:

2. The Defendant shall have fifteen (15) days from date to answer or demur to the complaint.

Dated this 1st day of March, 1978.

Raymond J. Sherwin
Judge of the Superior Court

[Appendix H]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA

DEPT. NO 9 — Beverly Little — COURT CLERK

HON. THOMAS F. McBRIDE — JUDGE — Not Reported — REPORTER

CITY OF VALLEJO, Plaintiff, vs. JAMES B. PACKARD, Defendant.	COUNSEL Michael H. Roush for Plaintiff Defendant In Pro Per

NATURE OF PROCEEDING:

Solano County
ACTION NO. 67645

DEMURRER OF DEFENDANT

☐ DROP FROM CALENDAR.
☐ CONTINUE TO
☐ SWORN

☐ SUBMITTED ON POINTS AND AUTHORITIES WITHOUT ARGUMENT
☒ ARGUED BY COUNSEL AND SUBMITTED
☐ TAKEN UNDER SUBMISSION
☐ POINTS AND AUTHORITIES TO BE SUBMITTED _____

☐ PURSUANT TO STIPULATION BY COUNSEL ☐ AFFIDAVIT OF PARTIES IN OPEN COURT

IT IS ORDERED:

☐ GRANTED ☐ DENIED

☒ DEMURRER ☐ SUSTAINED 15 DAYS ☐ AMEND ☒ ANSWER
☒ OVERRULED

☐ GROUNDS OF DEMURRER _____

☐ ORDER OF EXAMINATION DISCHARGED

☐

J. R. OLSSON, COUNTY CLERK
AND CLERK OF THE SUPERIOR COURT

BY Beverly Little, Deputy

DATE March 27, 1978

Appendix I

[74] James B. Packard
715 Tennessee Street
Vallejo, California 94590
Telephone: (707) 644-8221

In Pro. Per.

In the Superior Court of the State of California
For the County of Solano

Civil No. 67645

City of Vallejo,
Plaintiff,
vs.
James B. Packard,
Defendant.

DECLARATION OF
JAMES B. PACKARD

I, JAMES B. PACKARD, defendant in above-entitled action declare as follows:

1. That on or about May 20, 1947 I consummated a contract with the Pacific Telephone and Telegraph Co., a California Public Utility Corporation for business telephone service, account no. 3-8221, present account number expressed as 707-644-8221. This contract is still in effect and active.

2. That the rates for my charges for business telephone service were set by Cal. Railroad Comm. tariff sheet C.R.C. 131388 effective April 1, 1941.

3. That the obligation of the above mentioned contract is stated as follows:

> The total charge for business telephone service shall equal the tariff sheet rate times one month.

4. That in June 1959 I consummated a contract with Pacific Telephone and Telegraph Co. for telephone answer service in connection with my above mentioned business telephone service.

5. That the rates for my charges for answer service were set by Cal. Public Utilities Commission tariff sheet 4T9R.S.13 (1959). The obligation of my contract with Pacific Telephone Co. concerning answer service is stated as follows:

> [75] The total charge for answer service shall equal the tariff sheet rate times one month.

6. That in connection with my business telephone service contract there would be additional charges for long distance calls.

7. That the rates for long distance calls were set by Cal. Pub. Util. Comm. tariff sheet no. 53-T (1947).

8. That the obligation of the contract for long distance calls is stated as follows:

> The total charge for long distance calls shall equal the rate for the distance of the call times the minutes on the duration of the call.

9. That in February 1950 I consummated a contract with the Pacific Gas and Electric Co., a California Utility

Corporation for gas for 715 Tennessee St., account number JNY 0772 31601, meter number 71053.

10. The rates for gas were set by Cal. Pub. Util. Comm. tariff sheet no. 2728-G, effective Jan. 1950.

11. That the obligation of the contract for gas is stated as follows:

> The total charge for gas shall equal the tariff sheet rate times the number of cubic feet consumed.
> The meters read monthly.

12. That in February 1950 I consummated a contract with Vallejo Electric Light and Power Co. for lighting electricity. In June 1950 also a contract for electrical power, 3 phase for 715 Tenn. St. In December 1954 Pacific Gas and Electric Co. purchased Vallejo Electric Light and Power Co. and assume my contracts for electricity. My account number with PGE for lighting electricity now expressed as JNY 0772-31601 same as for gas; but account no. for electric power expressed as JNY A772 31651.

13. That the rates for lighting electricity set by Cal. Pub. Util. Comm. tariff sheet 215-E, effective 10/15/49 and electric power tariff sheet 211-E, effective 10/15/49 (V.El.Lt.&P.).

14. The obligation of the contract for electricity is stated as follows:

> [76] The total charge for electricity shall equal the tariff sheet rate times the number of kilowatt hours consumed.
> The meters read monthly.

15. That in October 1962 another contract for gas and lighting electricity for 311 Illinois 304, account number JNY 0771 31905, gas meter no. 33149, electric meter no.

7181 HFA, rates set by tariff sheets no. 5625-G, effective 4/16/61 and 2874-E, effective 11/15/57.

16. The obligation of the contract for gas and electricity for 311 Illinois 304 is same as for 715 Tennessee St. expressed above.

17. That there was no provision expressed or by implication for a utility user's tax to be included in any of the above mentioned obligation of the contracts.

18. That I have never agreed to pay the utility user's tax enforced on all my above mentioned contracts since November 1969.

19. That I have had to deduct the utility user's tax from all my total charges for utility service and remit the net amount plus send in a note explaining the deduction with my monthly payments to the above mentioned utility companies. The deductions of the tax are authorized by the California Public Utilities Commission ORDER in Decision no. 77800 (1970).

20. That the United States Constitution, Art. I (10) (1) to wit: "No State shall pass any law impairing the obligation of contracts" prohibits the enforcement, operation and execution of any law impairing the obligation of contracts.

21. That the enforcement, operation and execution of the utility user's tax on my above mentioned contracts by plaintiff under the authority of Ordinance 909 N.C. amended by Ordinance 234 N.C. 2d has added a charge at the present time and equal to 7½ percent of the charges for service to all my above mentioned contracts, which I refuse to pay because payment of the tax would impair the obligation of the contracts.

[77] 22. This is shown by adding the utility user's tax to above-mentioned charges for utility service the rate times the amount of utilities used does not equal the total charge for service, and the obligation of the contract is impaired. The obligation of the contract is the total charge for service shall only equal the rate times the amount of utilities used.

23. That I have an implied contract with Pacific Gas and Electric Co. and Pacific Telephone Co. for utility services.

California Civil Code Section 1621 is quoted as follows:

> "Implied Contract, What. An implied contract is one the existence and terms of which are manifested by conduct."

California Civil Code Section 1697 is quoted as follows:

> "Oral Contract. A contract not in writing may be altered in any respect by consent of the parties in writing, without a new consideration and is extinguished thereby to the extent of the new alteration."

24. That the enforcement, operation and execution of the utility user's tax on all my utility contracts alters the contracts.

25. I have never given my consent in writing to the alteration of my utility contracts for the addition of the utility user's tax as one of the terms.

26. That I want this case dismissed with *prejudice.*

James B. Packard
Defendant
Declarant

Subscribed and Sworn to before me the 6th day of March 1978

William E. Lightle
Notary Public In AND For The County
8 Solano, State of California

My commission expires April 7, 1979.

Appendix J

[122] In the Superior Court of the State of California
In and for the County of Solano
Department No. 4

No. 67645

City of Vallejo,
Plaintiff,
vs.
James B. Packard,
Defendant.

[Filed June 15, 1978]

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The motion of the plaintiff, CITY OF VALLEJO, came on regularly for hearing on May 3, 1978, in the above-entitled Court, before the Honorable Warren K. Taylor; MICHAEL ROUSH, Deputy City Attorney of the Office of the City Attorney, appeared on behalf of plaintiff and the defendant, JAMES B. PACKARD appeared in propria persona; and

The Court, having heard the oral arguments of both parties, and having taken the matter under submission at the conclusion of the hearing and now having considered the arguments of counsel, both for and against the granting of said motion for summary judgment; and all things having been done and considered.

IT IS HEREBY ORDERED that the Motion for Summary Judgment [123] filed herein on behalf of the plaintiff be, and it hereby is, GRANTED.

Dated: June 8, 1978.

Warren K. Taylor
Judge of the Superior Court

Appendix K

[131] John M. Powers
City Attorney, City of Vallejo
City Hall
Vallejo, California 94590
(707) 553-4245

Michael H. Roush
Deputy City Attorney
Attorney for Plaintiff

In the Superior Court of the State of California
In and for the County of Solano

No. 67645

City of Vallejo,
a Municipal Corporation,
Plaintiff,

vs.

James B. Packard,
Defendant.

[Filed July 13, 1978]

SUMMARY JUDGMENT

(Pursuant to CCP § 473c)

On June 15, 1978, this Court duly made an order granting Plaintiff's motion for summary judgment, made pursuant to § 437c of the Code of Civil Procedure, on the ground that the matter was res judicata, that there was no defense to the action, and that there was no triable issue of fact, and entering for Plaintiff.

In that the original complaint filed by plaintiff requested leave to amend the complaint to show the accrual of defendant's delinquent utility users' tax, according to proof at trial, plaintiff has filed herewith the Declaration of Michael B. Lynch, Commercial Divisions Supervisor, setting forth the amounts which have not been paid by defendant through the dates for which the amounts are available [132] to Plaintiff.

In accordance with the above order and said Declaration:

IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiff CITY OF VALLEJO, have judgment against Defendant, JAMES B. PACKARD, and that Plaintiff recover from Defendant as follows:

(1) The sum of TWO HUNDRED NINETY-SIX DOLLARS and FIFTY-EIGHT CENTS ($296.58), said sum representing TWO HUNDRED THIRTY-SEVEN DOLLARS and EIGHTEEN CENTS ($237.18) in unpaid utility users' tax and FIFTY-NINE DOLLARS and FORTY CENTS ($59.40) penalty;

(2) Interest on that sum, at the rate of 6% per annum from and after the date of this judgment;

(3) Plaintiff's cost herein incurred in the sum of THIRTY-SIX DOLLARS and SIXTY CENTS. ($36.60).

Dated: July 10, 1978.

Warren K. Taylor
Judge of the Superior Court

Appendix L

[130] Superior Court of Solano County
Case Number 67645

Hon. Warren K. Taylor
Judge

City of Vallejo,
a Municipal Corporation,
Plaintiff,

vs.

James B. Packard,
Defendant.

NOTICE OF ENTRY OF JUDGMENT

You are hereby notified, in compliance with Section 664.5 of the Code of Civil Procedure, that Judgment in the above entitled action was entered on July 13th, 1978 in Judgment Book No. 112 at page 67.

Witness my hand this 13th day of July, 1978.

By Linda Te
Deputy Clerk

Appendix M

[140] August 10, 1978

James B. Packard
715 Tennessee Street
Vallejo, California 94590

Re: *City of Vallejo v. Packard,*
No. 67645.

Dear Mr. Packard:

Your letter of July 14, 1978 is acknowledged.

A review of the file discloses no reference to the fact that there is or ever was a dispute as to the dollar amount of your utility user's tax. The only issue raised is the validity or constitutionality of ultility user's tax. The declaration of Michael Lynch, Tax Assessor, filed July 13, 1978, is merely a statement of the current amount of the tax owed by you.

The determination of the validity of the tax is one of law, not fact, and is properly subject to summary judgment. *Lord v. County of Marin* (1963) 214 Cal.App.2d 25. See also *Dryer v. Dryer* (1964) 231 Cal.App.2d 441 and *People v. One 1964 Chevrolet* (1969) 274 Cal.App.2d 720, where summary judgment was granted on the basis of *res adjudicata* or collateral estoppel.

On the subject of Findings of Fact and Conclusions of Law, and the need therefore after a summary judgment is granted, see *de Echeguren v. de Echeguren* (1962) 210

Cal.App.2d 141, 148 and *Dixon v. Ford Motor Co.* (1975) 53 Cal.App.3d 449.

Very sincerely yours,

/s/ Warren K. Taylor
Judge of the Superior Court,
Assigned

WKT:s
cc: Michael H. Roush
Deputy City Attorney, Vallejo
Box I
Fairfield, CA 94533

Appendix N

In the Court of Appeal
of the
State of California

First Appellate District

Division One

1 Civil No. 45445

City of Vallejo,
Plaintiff and Respondent,
vs.
James B. Packard,
Defendant and Appellant.

[Filed December 19, 1978]

BY THE COURT:

The motion for summary reversal is denied.

Dated December 19, 1978

Racanelli, P.J.

Appendix O

In the Court of Appeal
of the
State of California

First Appellate District

Division One

1 Civil No. 45445

City of Vallejo,
Plaintiff and Respondent,
vs.
James B. Packard,
Defendant and Appellant.

[Filed February 6, 1979]

BY THE COURT:

The appellant having failed to file a brief after notice given under Rule 17(a) of the California Rules of Court, the appeal is dismissed.

Dated February 6, 1979

Racanelli, P.J.

Appendix P

In the Supreme Court
State of California

In Bank

1st Civil No. 45445

City of Vallejo
v.
Packard

[Filed February 14, 1979]

Application to transfer the above entitled cause to the Supreme Court is denied.

Bird
Chief Justice